IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Roberta Karnofsky, Plaintiff, vs. Massachusetts Mutual Life Insurance Company, Defendant.	)	C/A No.: 2:14-cv-00949-PMD **DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendant Massachusetts Mutual Life Insurance Company ("MassMutual") respectfully submits this Opposition to Plaintiff Roberta Karnofsky's Motion for Partial Summary Judgment:

I. BACKGROUND

The record in this case establishes that MassMutual appropriately handled Plaintiff Roberta Karnofsky's claim.[1] In 2007, Plaintiff was employed by Anesthesia Associates of Charleston, P.A. ("Anesthesia Associates") as an anesthesiologist.[2] At the time of Plaintiff's claimed date of disability, Plaintiff was performing pain management procedures four days a week and anesthesia in the operating room one day a week. (Exhibit A, p. 81). From April 2006 through March 2007, production reports from Anesthesia Associates revealed that during the twelve months immediately preceding April 2007, 73% of Dr. Karnofsky's patients were treated for pain

1 Defendant incorporates herein by reference the factual background contained in Defendant's Memorandum In Support of Defendant's Motion For Summary Judgment.

2 Contrary to footnote 3 of Plaintiff's brief, MassMutual's vocational consultant, Frank Fresca, did discuss the duties of Plaintiff's occupation on pages two and three of his report when he discussed the pain management procedures Plaintiff was performing based on the 17 days of billing records Plaintiff provided. (Plaintiff's Exhibit 9, MM001400-1401).

management services and billed under CPT[3] codes 62310 and 62311 (pain management injections of diagnostic or therapeutic substances to the cervical, thoracic, lumbar or sacral locations of the patient). (Exhibit B). Approximately 50% to 51% of Plaintiff's income came from pain management procedures. (Exhibit A, p. 88; Exhibit C).

On April 10, 2007, Plaintiff was injured in a motor vehicle accident. (Exhibit C). Plaintiff suffered injuries to her neck and back. Plaintiff continued to work at Anesthesia Associates performing pain management procedures four days a week and anesthesia in the operating room one day a week until March 2, 2010, when Plaintiff was terminated from Anesthesia Associates without cause. (Exhibit A, pp. 118-119, Depo. Ex. 24).

On September 29, 2011, Plaintiff submitted her Proof of Disability forms to MassMutual. (Defendant's Memorandum, Exhibit A, pp. 44-46; Exhibit C, D). In this Proof of Disability form, Plaintiff indicated that her symptoms first appeared on April 10, 2007, the day of her accident. She further indicated that she was partially unable to work from "04-10-2007 to 04-14-2010" and totally unable to work from 04-15-2010 to present."

When MassMutual ultimately received information essential to its claim determination, MassMutual made its claim determinations in consideration of the information that had been submitted and gathered. (Exhibit D). On January 30, 2012, while still waiting on Plaintiff to submit required information such as the CPT code production reports from Anesthesia Associates that Plaintiff claimed did not exist (when in actuality, they did), MassMutual paid Plaintiff Total Disability Benefits under a reservation of rights for the period October 10, 2011 to February 9,

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3 The Current Procedural Technology code is a system developed by the American Medical Association for standardizing the terminology and coding used to describe medical services and procedures.

2012, based on the fact that Plaintiff had undergone surgery on July 12, 2011 and December 8, 2011. (Exhibit D).

On March 9, 2012, while still awaiting receipt of the CPT code production reports and other information requested from Plaintiff, MassMutual paid Total Disability Benefits under a reservation of rights for the period February 10, 2012 to March 9, 2012. (Exhibit D).

On August 2, 2013, MassMutual, applied the Late Notice and Proof of Disability provisions of the policy. Plaintiff's Notice of Claim and Proof of Disability were filed four years late, which led MassMutual to determine that the earliest retroactive date of disability MassMutual could apply was June 12, 2010. (Exhibit D). MassMutual also found that Plaintiff failed to meet the definition of Total Disability because Plaintiff continued to perform pain management procedures which was a significant portion of the main duties of Plaintiff's occupation pre-disability. (Exhibit D). MassMutual additionally found that Plaintiff likely suffered a Partial Disability for the periods September 10, 2010 through July 11, 2011, and March 10, 2012 through June 9, 2012, but that additional information was needed to assess Plaintiff's disability after June 9, 2012. (Exhibits D, G). Given MassMutual's acceptance of the earlier Disability date of June 12, 2010, the satisfaction of Dr. Karnofsky's 90-day waiting period on September 9, 2010, and the continuation of her claim for disability benefits following her surgical procedure on July 12, 2011, MassMutual issued Total Disability benefits for what was previously considered to be her 90-day waiting period from July 12, 2011 through October 9, 2011. (Exhibit D). MassMutual also paid Plaintiff Partial Disability benefits for the period March 10, 2012 through June 9, 2012. MassMutual additionally requested additional information to access the claim after June 9, 2012, including, but not limited to monthly profit and loss statements from Lowcountry Laserworks and Charleston Pain Care to present and Plaintiff's tax returns. (Exhibits D, G).

I. DISCUSSION

A. Plaintiff's Claim Regarding Total Disability Attempts To Create An Ambiguity Where None Exists.

Plaintiff's motion with respect to Total Disability benefits should be seen for what it is, an attempt to create an ambiguity where none exists. "Ambiguity may not be created in an insurance policy by singling out a sentence or a clause . . . [and] courts may not torture the ordinary meaning of language to extend coverage expressly excluded by the terms of a policy." Laidlaw Environmental Services v. Aetna Casualty and Surety Co. , 338 S.C. 43, 524 S.E.2d 847 (Ct. App. 1999); Falkosky v. Allstate Ins. Co., 311 S.C. 369, 371, 429 S.E.2d 194, 196 (Ct. App.), modified, 312 S.C. 210, 439 S.E.2d 836 (1993).

Plaintiff's argument that the term "main duties" is a noun used to describe a number of "collective" duties and therefore Plaintiff is totally disabled if she cannot do one main duty, flies in the face of basic, English grammar usage. "Main" as indicated in the policy is clearly an adjective modifying the noun "duties". Duties with an "s" on the end indicates that it is plural, meaning more than one. "The most common pattern for the formation of the written plural of English nouns is the addition of –s or -es." The New Lexicon Webster's Dictionary of The English Language, 773 (1989 ed). See Berenguer v. Lincoln National Life Insurance Company, 2006 U.S. Dist. LEXIS 83172 (E.D. Va. 2006) (where the Court ruled on other grounds, but noted "as Lincoln National's counsel put it at trial, if one were to ask a third-grade student to name the states of the United States, "the only way Johnny would get a 100 on that test is to name all 50 states." Id.). Plaintiff asks the Court to ignore the "s" and change the plural "duties" to the singular "duty". To adopt such an interpretation ignores the basic rules of English grammar, results in a tortured reading and is not supported by the law of the Fourth Circuit, nor the law of District of South Carolina. See Conway v. The Paul Revere Life Insurance Company, 70 Fed.Appx.117 (4th Cir. 2003) (holding that based on similar definitions of total disability, a claimant must show his disability prevented him from performing all of his material occupational duties, not just some of them, or else the existence of the residual or partial disability portion of the policy would have no meaning); Zink v. Provident Life and Accident Insurance Company, 6:10-cv-02876-HMH (D.S.C. 2010) (unreported) (where the District of South Carolina ruled that a similar total disability definition, namely that the insured is totally disabled if s/he is "unable to perform the material and substantial duties of your occupation" and "cannot do the substantial duties of his or her regular job", required the insured to demonstrate he could not perform all of the material and substantial duties of his occupation to be totally disabled).

As was argued in Defendant's memorandum in support of its motion for summary judgment, Plaintiff's interpretation also falls flat when the total disability provision is read in conjunction with the definition of partial disability. The total disability provision states that "[t]he Insured is Totally Disabled if he/she cannot perform the main duties of his/her Occupation due to Sickness or Injury." (Plaintiff's Memorandum In Support, Exhibit 1, MMPOL 00011). The Partial Disability provision states, "[t]he Insured is Partially Disabled if he/she… is suffering from a current Disability; is working at his/her Occupation…" (Plaintiff's Memorandum In Support, Exhibit 1, MMPOL 00011). To adopt Plaintiff's interpretation that an insured would be totally disabled if they were prevented from performing only one of the main duties of their occupation, would nullify the partial disability provision. "It is fundamental that all terms of a contract shall be considered and given effect if possible." Johnson v. Glens Falls Ins. Co., 127 S.E. 14 (S.C. 1925); Valley Public Service Authority v. Beech Island Rural Community Water District, 462

S.E.2d 296 (S.C. App. 1995). In construing a contract, every word should be regarded as having meaning. Friedheim v. Walter H. Hildic Co., 89 S.E. 358 (S.C. 1916). Under Plaintiff's interpretation, an insured would be either totally disabled or not disabled at all. There would be no scenario where the partial disability provision would apply. The MassMutual policy clearly contemplates that there is a level of disability between total disability and no disability. Therefore, the only way to give effect to the partial disability provision is to read the total disability provision as an insured is totally disabled if they cannot perform all of the main duties of their occupation. To use any other interpretation is to ignore the language of the policy and render the partial disability provision meaningless.

While Plaintiff's brief states that "[c]ourts have interpreted claims involving the same language as the present and have refused to construe a disability policy as the carrier demanded to mean 'all' of the duties of a profession", Plaintiff's brief cites only one case, Bybel v. Metropolitan Life Insurance Company, 2010 U.S. Dist. Lexis 122367 (E.D. Pa. 2010) (unreported). Further, Plaintiff's reliance on Bybel is misplaced. First, Bybel involved Pennsylvania law and is not controlling authority. Second, contrary to Plaintiff's assertion, the Court in Bybel *did not* find as a matter of law that the plaintiff was totally disabled if she could not perform one of the main duties of her occupation. While the Court did deny Met Life's motion for summary judgment, it found that there was a genuine issue of fact whether plaintiff was totally disabled under the terms of the policy. Id. at *23-24. Finally, Bybel is easily distinguished in that unlike the present case, the plaintiff's employer in Bybel terminated the plaintiff because she was not able to perform her job. Here, there is no such evidence. (See Exhibit E). Accordingly, Babel has no application to the present case, and MassMutual's interpretation of the Total Disability provision was correct. Therefore, Plaintiff's Motion for Partial Summary Judgment should be denied on the issue of Total

Disability.

B. Resorting To Extrinsic Evidence In An Attempt To Give a Contract a Different Meaning From That Indicated by its Plain Terms Is Improper.

Plaintiff's resort to extrinsic evidence in an attempt to give a contract a different meaning from that indicated by its plain terms is improper. First, Defendant objects to Plaintiff's reliance on the alleged Connecticut Mutual policy with an unknown insured (Plaintiff's Exhibit 15) because this document has not been properly authenticated. Because this document is not admissible evidence, it is not appropriate for consideration at summary judgment. In assessing a summary judgment motion, a court is entitled to consider only the evidence that would be admissible at trial. See Maryland Highways Contractors Ass'n, Inc. v. State of Maryland, 933 F.2d 1246, 1251 (4th Cir. 1991) (noting that "hearsay evidence, which is inadmissible at trial, cannot be considered on a motion for summary judgment"); 11-56 Moore's Federal Practice-Civil §59.91. Documents that are not properly authenticated cannot be relied upon at summary judgment. Duplantis v. Shell Offshore, Inc., 948 F.2d 187 (5th Cir. 1991). Plaintiff failed to establish any foundation for the admission of this document into evidence because even the most rudimentary information required to authenticate the document, such as the name of the insured and policy number were redacted prior to the document being produced for the first time at the deposition for Robert F. Miles, MassMutual's 30(b)(6) witness. Because this document was not properly authenticated, it cannot be relied upon at summary judgment and should be stricken.

Defendant also objects to Plaintiff's reference to the alleged Connecticut Mutual policy because the language of the other alleged Connecticut Mutual policy is irrelevant. Courts cannot use construction to change an unambiguous contract or agreement. Gilstrap v. Culpepper, 283 S.C. 83, 320 S.E.2d 445, 447 (1984). Rather, courts can only interpret contracts as they are written. Id.

"Extrinsic evidence giving [a] contract a different meaning from that indicated by its plain terms is inadmissible." C.A.N. Enter., Inc. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 373 S.E.2d 584, 586 (1988) (citing Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 199 S.E.2d 719, 722 (1973)). Plaintiff cannot use the language of a policy unrelated to this litigation to create an ambiguity in the policy in this litigation. Therefore, Plaintiff's reference to an alleged Connecticut Mutual policy that is not part of this litigation is irrelevant and all references thereto should be stricken.

Likewise, Plaintiff's attempt at pages 12-15 of her brief to use testimony from MassMutual's expert witness, Barbara Mueller and MassMutual's 30(b)(6) witness, Robert Miles, to create an ambiguity is improper because interpretation of an unambiguous contract term is a matter of law for the Court. The interpretation of an insurance policy is a legal issue under South Carolina law. City of Hartsville v. S.C. Mun. Ins. & Risk Financing Fund, 382 S.C. 535, 677 S.E.2d 574, 578 (2009) (citing State Farm Mut. Auto. Ins. Co. v. James, 337 S.C. 86, 522 S.E.2d 345, 348-49 (Ct. App. 1999)). When a contract is clear and unambiguous, the contract language alone determines how the contract is enforced and the contract terms must be construed by the court to give effect to their "plain, ordinary, and popular meaning." Laidlaw Envtl. Servs. (TOC), Inc. v. Aetna Cas. & Sur. Co. of Ill., 338 S.C. 43, 524 S.E.2d 847, 850 (Ct. App. 1999) (citing Dorman v. Allstate Ins. Co., 332 S.C. 176, 504 S.E.2d 127, 129 (Ct. App. 1998)). Because witness testimony cannot be used to create an ambiguity in an unambiguous policy, only the language of the policy is relevant. Accordingly, Plaintiff's attempt to create an ambiguity through testimony is improper and should be stricken.

Notwithstanding the above objections, nothing contained in the alleged Connecticut Mutual Policy, nor the 30(b)(6) testimony of Bob Miles undercuts MassMutual's interpretation of the Total Disability provision in Plaintiff's policy in any way. Under either the language of MassMutual policy or the alleged Connecticut Mutual policy, the result would be the same. Plaintiff would not be totally disabled because post-disability she still was performing pain management which was a main duty of her pre-disability occupation. As was previously argued, Plaintiff asks the Court to ignore the "s" and change the plural "duties" to the singular "duty" which is a tortured reading that ignores the basic rules of English grammar. Also, the only way to give effect to the partial disability provision is to read the total disability provision as an insured is totally disabled if they cannot perform all of the main duties of their occupation. To use any other interpretation is to ignore the language of the policy and render the partial disability provision meaningless. Therefore, even taking into account the extraneous evidence as Plaintiff proposes, Plaintiff's Motion For Partial Summary Judgment on the issue of Total disability should be denied.

C. The Regulation

Contrary to Plaintiff's argument, S.C. Code Regs. 69-34 (2014) support's MassMutual's interpretation of the Total Disability provision. 69-34 (9)(c) states:

> (c) An insurer may specify the requirement of the complete inability of the person to perform all of the substantial and material duties of his regular occupation or words of similar import. An insurer may require care by a physician (other than the insured or a member of the insured's immediate family).

Id. MassMutual's interpretation that the definition of total disability requires Plaintiff be unable to perform all of the main duties of her occupation is consistent with the definition of total disability allowed by S.C. Department of Insurance regulation. Additionally, the above regulation does not require the definition of total disability to mirror the language of the regulation. The phrase "…or words of similar import" clearly allows the policy to deviate from the language in the regulation as long as the language is similar.[4] While the language of the regulation uses "material and substantial" and the MassMutual policy uses "main", both the regulation and the policy use the plural word "duties". Using either "material and substantial duties" or "main duties", the use of the plural word "duties" requires that the insured be unable to perform all of their "material and substantial duties" and/or "main duties" to be totally disabled. Therefore, MassMutual's interpretation of the Total Disability provision was supported by the regulation and Plaintiff's Motion For Partial Summary Judgment should be denied as to this issue.

D. Performing Pain Management Was A Main Duty of Plaintiff's Occupation On Her Alleged Date of Disability.

Plaintiff's argument that pain management is not a main duty of an anesthesiologist misses the point and has no basis in fact. First, even assuming that pain management is not a main duty of an anesthesiologist, which it is, pain management duties were main duties of Plaintiff's occupation on the date of her claimed disability. It is undisputed that in the year prior to Plaintiff's claimed disability, pain management was a main duty of Plaintiff's occupation. Plaintiff's own memorandum in support admits that at the time of her accident in 2007 she was only working in the operating room one day a week and performing pain management procedures four days a week. (Plaintiff's Memorandum In Support, p. 3). Plaintiff's memorandum also admits that 50% of her income derived from operating room anesthesia and 50% from pain management procedures. (Plaintiff's Memorandum In Support, p. 3). From April 2006 through March 2007, production reports from Anesthesia Associates, Plaintiff's employer, revealed that during the twelve months

4 The fact that the S.C. Department of Insurance approved this MassMutual policy for sale in S.C. indicates that at least as far as the SCDOI was concerned, the language of the MassMutual policy complied with 69-34 (9)(c).

immediately preceding April 2007, 73% of Dr. Karnofsky's patients were treated for pain management services. (Exhibit B). During Plaintiff's claim, Plaintiff even admitted that pain management was a main duty of her occupation in 2007 when she referred back to her position in 2007 as an "Anesthesiologist who practiced Pain Management." (Exhibit A, p. 166, Depo. Ex. 41). Additionally, Plaintiff's own insurance expert testified that pain management was a main duty of Plaintiff's occupation. (Exhibit F, p. 64). Therefore, clearly pain management duties were main duties of Plaintiff's occupation as she performed it at Anesthesia Associates on the date of her alleged disability.

Plaintiff seems to argue because she listed her occupation in the policy application as an anesthesiologist, MassMutual is bound by that title and cannot investigate Plaintiff's actual occupational duties on the date of disability. However, this approach is not supported by the language of the policy and/or the law. The MassMutual policy defines "Occupation" as "the Insured's regular profession(s) or business(es) at the start of disability." (Emphasis added) (Plaintiff's Memorandum In Support, Ex. 1, MMPOL 00010). Therefore, under the policy, it is how Plaintiff was performing her profession on her date of disability, and not the title she listed in her application that is relevant.[5]

Plaintiff's argument also is not supported by general disability insurance law. The general rule, supported by numerous decisions, is that the term "occupation" in a disability insurance policy is not ambiguous and refers to the occupation of the insured at the time of disability, not the occupation stated on the application for insurance. See e.g., Winter v. Minnesota Mutual Life Ins.

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5 If the parties are bound by the occupation listed in Plaintiff's insurance application as Plaintiff argues, the parties also should be bound by the description of the occupational duties of an anesthesiologist listed in the application where Plaintiff indicated her occupation required no lifting. (Exhibit A. pp. 126-129, Depo. Ex. 7).

Co., 199 F.3d 399, 401, 408-10 (7th Cir. 1999)(recognizing that "other courts interpreting the term 'regular occupation' have held that term to be unambiguous and that disability benefits should be determined from the occupation of the insured at the time of injury or sickness, not the occupation stated in the insurance policy"; following majority); Metropolitan Life Ins. Co. v. Foster, 67 F.2d 264, 265-66 (5th Cir. 1934) ("Where the policy speaks of a disability which prevents the insured from carrying on 'his occupation,' the reference is clearly to his usual occupation at the time of the disability"); Emerson v. Firemans' Fund, 524 F. Supp. 1262 (N.D. Ga 1981) (when an insured changes jobs, it is his occupation at the time of the disability, not at the time the policy went into effect, that controls); Giampa v. Trustmark Ins. Co., 77 F. Supp.2d 22, 25 (D. Mass. 1999) ("Generally speaking, 'regular occupation' in an occupational disability policy refers to the claimant's occupation at the time his disability occurs"); New York Life Ins. Co. v. Saunders, 314 Ky. 577, 236 S.W.2d 692, 695 (1951) (case "should have been governed by the controlling occupation or occupations of the insured at the time his alleged disability began, and should not have been confined to his occupation at the time the policy was issued"); Francois v. Mutual Life Ins. Co. of New York, 405 So.2d 1292, 1295 (La. App. 1981)(disability not tested from occupation stated in the application); Hopkins v. North Am. Co. for Life and Health Ins., 594 S.W.2d 310, 315 (Mo. Ct. App. 1980)(term "regular occupation" is unambiguous and generally means insured's occupation at time disability occurs, not occupation in application); Colaluca v. Monarch Life Ins. Co., 101 R.I. 636, 643, 226 A.2d 405, 410 (1967)(when term "regular occupation" is not defined in policy, it becomes the work insured was doing at time of injury). According, Plaintiff's argument that the occupation listed in the application controls is not supported by general, disability insurance law.

Second, pain management is a main duty of an anesthesiologist. The American Board of

Anesthesiology's description of an anesthesiologist includes pain management as a main duty of an anesthesiologist. (Exhibit A, Depo. Ex. 4). This description states in relevant part: "…In addition to these management responsibilities, the Anesthesiologist provides medical management and consultation in pain management and critical care medicine. Anesthesiologists diagnose and treat acute, long-standing and cancer pain problems, diagnose and treat patients with critical illnesses or severe injuries…(Emphasis added). Plaintiff even admitted that pain management was a main duty of an anesthesiologist when she testified that she agreed that the above duties, including pain management, were ones that a board certified anesthesiologist was trained to do. (Exhibit A, pp. 37-38, Depo. Ex. 4). Plaintiff testified:

> Q. Do you agree with this statement?
> A. I agree with the broad term. This is a description of everything that an anesthesiologist is trained to do. In the reality of everyday practice it's different everywhere you go in every practice and every -- potentially every hospital, every practice, every city or state. It's practiced differently within these guidelines. Some places, they do all these things. Some places, they do not many of these things. But this is when someone is board certified, they are certifying that that person is adequately trained to perform these functions and duties. I -- I agree with that as a description of -
> Q. Okay.
> A. -- the training. I don't agree that this is what every anesthesiologist does day to day in every position, because it's very different according to where you are and where you go.

(Exhibit A, pp. 37-38). Because both the body governing the certification of anesthesiologists and Plaintiff state that pain management is a main duty of an anesthesiologist, Plaintiff's argument fails.

Third, the Dictionary of Occupational Titles relied upon by Plaintiff is not a controlling authority because it is outdated and has been replaced by the Department of Labor's "O'Net OnLine". "The Department of Labor no longer maintains or publishes the Dictionary of

Occupational Titles. The DOT was last updated in 1991. The DOL's 'O'Net OnLine'[6] service… is the current source of information used to determine qualifying work experience. 67 Fed. Reg. 51752-01." Jordan v. Astrue, 2009 U.S. Dist. LEXIS 97879 (D. Neb. 2009). Even assuming the DOT is still good authority, the DOT listing for an anesthesiologist lists, among other duties, an anesthesiologist "administers anesthetics to render patients insensible to pain during surgical, obstetrical, and other medical procedures: …administers local, intravenous, spinal, caudal, or other anesthetic according to prescribed medical standards." (Emphasis added) (Plaintiff's Memorandum In Support, Exhibit. 3). These types of duties are exactly the types of procedures Plaintiff performed and continued to perform before and after her alleged disability. Specifically, Plaintiff performed and continued to perform epidural injections of anesthetic and therapeutic substances into the cervical, thoracic, lumbar or sacral locations of patients (CPT codes 62310 and 62311), sometimes using fluoroscopic guidance in regard to spine injections (CPT codes 76005 and 77003). (Exhibit A, pp. 92-99, Depo. Exs. 2, 17, 18). Accordingly, pain management procedures are main duties of anesthesiologists under the DOT.

Finally, the more up-to-date Department of Labor online publication, "O'Net", also included pain management as one of the main duties of an anesthesiologist. This conclusion was confirmed by the testimony of Plaintiff's own insurance expert, Mary Fuller, who testified that the "O'Net" description of an anesthesiologist included pain management. (Exhibit F, p. 60). Accordingly, the evidence demonstrates not only that pain management is a main duty of anesthesiologists, but also and more importantly for purposes of this case, it was one of her main duties pre-disability.

[6] Accessed at http://online.onetcenter.org.

E. Plaintiff's Argument That She Is Entitled To Invoke The "Own Occupation Rider" Fails As a Matter of Law Because Plaintiff was Not Totally Disabled.

The "Own Occupation Rider" has no application to Plaintiff's claim because the rider only applies to claims involving total disability and Plaintiff was not totally disabled. Plaintiff argues that she is entitled to recover total disability benefits under the "Own Occupation Rider" from 2010 to present, rather than partial disability benefits.[7] However, Plaintiff's "Own Occupation Rider" argument fails because Plaintiff must first be totally disabled for the "Own Occupation Rider" to take effect. The rider states:

> This Rider modifies the Total Disability Benefits provided by Your Policy. Income earned from a new occupation will not affect the Total Disability Benefits provided under this Rider. Payment under this Rider will be in lieu of any other Total Disability Benefit payments under the Policy…
>
> Modification To The Total Disability Benefits Provision of Your Policy
>
> The following replaces the second paragraph of the Total Disability Benefits provision of Your Policy up to the Monthly Benefit for this Rider shown in the Policy Specifications.
>
> • If the Insured is working in a now occupation: A Total Disability may prevent the Insured from returning to his/her Occupation. However, an Income may be earned in a new occupation. If this should occur, We will pay the Total Disability Monthly Benefit shown in the Policy Specifications…

(Plaintiff's Memorandum In Support, Exhibit 1, MMPOL 00019).

Because Plaintiff continued to perform pain management procedures which were main duties of Plaintiff's pre-disability occupation, Plaintiff did not meet the definition of Total

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7 MassMutual paid Plaintiff partial disability benefits from September 9, 2010 to July 11, 2011, total disability benefits for the period July 12, 2011 to March 9, 2012, and partial disability benefits from March 10, 2012 to June 9, 2012. (Exhibit D). For the period Plaintiff was paid Total Disability benefits, Plaintiff was paid the maximum month amount of Total Disability benefits under the policy at $5,625 a month. Therefore, Plaintiff's "Own Occupation Rider" argument only applies to the period Plaintiff was paid partial disability benefits.

Disability contained in the MassMutual policy. Therefore, the provisions of the "Own Occupation Rider" did not apply.

F. Plaintiff Is Not Entitled To Additional Partial Disability Benefits For The Period June 2010[8] through July 2011.

Plaintiff's motion argues that while MassMutual paid Plaintiff Partial Disability benefits for the period September, 2010 through July 2011 in the monthly amount of $2,812.50 for a total of $28,312.50 (representing 50% of the Partial Disability Benefit amount), MassMutual should have paid Plaintiff an additional $5,625.00 per month for a total of an additional $28,312.50 (100% full Partial Disability Benefit amount). (Plaintiff's Memorandum In Support of Summary Judgment, p. 19, Ex. 17). However, Plaintiff's argument is misplaced because Plaintiff failed to submit sufficient evidence showing an entitlement to payment of 100% of the Partial Disability benefit amount. The Plaintiff bears the burden of proving she satisfied all of the terms and conditions of the Policy and therefore was legally entitled to disability benefits. Gaddy v. The Guardian Life Insurance Company of America, 2010 U.S. Dist. Lexis 105946 (D.S.C. 2010) ("In submitting a claim for residual disability benefits and alleging breach from Berkshire/Guardian's non-payment, the plaintiff bears the burden of proving she satisfied all of the terms and conditions of the insurance policies and therefore was legally entitled to disability benefits.").

Under the terms of the MassMutual policy, if Plaintiff met the definition of Partial Disability among other things, having suffered a Loss of Income ("LOI") of at least a 20% Loss of Pre-disability Income ("PDI")), for the first 12 months of disability, Plaintiff would be paid

[8] Because June 2010 was the earliest date of disability that MassMutual could recognize under the policies' Proof of Disability provision, benefits commenced on September 10, 2010 after the expiration of the policy's 90 day Waiting Period. (Exhibits D, G).

50% of the "Partial Disability Monthly Benefit shown in the Policy Specifications." (Plaintiff's Memorandum In Support, Exhibit 1, MMPOL 00012). However, if the Insured's Loss of Income exceeded 75% of Pre-disability Income, MassMutual would pay 100% of the Partial Disability Monthly Benefit shown in the Policy specifications. (Plaintiff's Memorandum In Support, Exhibit 1, MMPOL 00012). Because Plaintiff failed to submit proof that she suffered a Loss of Income greater than 75% for the period of September, 2010 through July 2011, MassMutual's payment of 50% of the Partial Disability amount was appropriate. (Exhibit G).

The Policy defines "Income" as "Gross earnings of the Insured from his/her personal activity in any profession(s) or business(es). If the Insured's vocation involves ownership of any portion of any profession or business, including any corporation, Income includes his/her share of the earnings of that profession or business due to such ownership. We will deduct from gross earnings any amount which is deductible as a business expense for Federal Income Tax Purposes. Income does not include…" (Plaintiff's Memorandum In Support, Exhibit 1, MMPOL 00010). The Policy defines "Current Income" as "Income received during a period of Disability for which a benefit is claimed, excluding any amounts earned prior to the start of Disability." (Plaintiff's Memorandum In Support, Exhibit 1, MMPOL 00010). The Policy defines "Pre-disability Income" as "[t]he greater of; the average monthly Income earned and received for the last 12 months before the start of Disability; or the average monthly Income earned and received for the last 24 months before the start of Disability; or the average monthly Income earned and received for the highest consecutive 24 months during the 60 months prior to Disability. (Plaintiff's Memorandum In Support, Exhibit 1, MMPOL 00011). Finally, the Policy defines "Loss of Income" as "[t]he Insured's Pre-disability Income minus his/her Current Income, calculated on a basis consistent with that used to calculate Pre-disability Income. (Plaintiff's Memorandum In Support, Exhibit 1, MMPOL 00010). Accordingly, Plaintiff had to submit sufficient evidence for MassMutual to calculate Plaintiff's Current Income so that it could calculate the Loss of Income.

Because Partial Disability benefits are calculated on a monthly basis, it was crucial that MassMutual receive sufficient information from Plaintiff to calculate Plaintiff's monthly Loss of Income. (Exhibit G). While Plaintiff submitted some financial information from her two businesses, Charleston Pain Care and Lowcountry Laserworks, for the time period June 12, 2010 to July 11, 2011, this information was not in the usual and customary income and expense format. It was not submitted as monthly profit and loss statements which are routinely kept by businesses, nor was it provided in a format that allowed MassMutual to make an accurate calculation of monthly compensation and net income for the relevant time period. (Exhibit G). MassMutual made multiple requests for monthly profit and loss statements for Charleston Pain Care and Lowcountry Laserworks for the relevant time period, only to be told by Plaintiff that no monthly profit and lost statements existed. (Exhibit G).

Despite Plaintiff's failure to submit sufficient proof of a Loss of Income, MassMutual concluded that based on a review of the information in totality, a minimum qualifying Loss of Income was likely experienced. Therefore, MassMutual, as a service to Plaintiff, paid the 50% Partial Disability benefits to Plaintiff for the period September, 2010 through July 2011. (Exhibit G). Because Plaintiff failed to submit sufficient proof that she suffered a more than a 75% Loss of Income during the relevant time period, MassMutual's payment of 50% of the Partial Disability amount was appropriate and comported with the terms of the policy. Therefore, Plaintiff's Motion For Partial Summary Judgment should be denied as to this issue.

G. Plaintiff Failed To Prove She Was Entitled To 100% Partial Disability Benefits After June 2012.

Plaintiff argues that based on a document titled "File Consultation" contained in the MassMutual claim file that Plaintiff is entitled to Partial Disability benefits after June 2012, in that MassMutual somehow conceded on July 23, 2013 that Plaintiff had a greater than 75% Loss of Income. (Plaintiff's Memorandum In Support, p. 18, Ex. 16). However, Plaintiff's argument is misleading and has no basis in fact.

First, as was argued in Defendant's Motion For Summary Judgment, Plaintiff failed to establish eligibility for any Partial Disability benefits after June 2012 because Plaintiff failed to prove a Demonstrated Relationship between any alleged Loss of Income and the current Disability. (Defendant's Memorandum, pp. 21-24). To avoid unnecessary duplication, Defendant refers the Court to Defendant's arguments contained in Defendant's Memorandum in Support of Defendant's Motion For Summary judgment.

Second, in addition to failing to establish a Demonstrated Relationship, Plaintiff never submitted her 2013 tax return to MassMutual despite the fact that MassMutual requested it on numerous occasions. By failing to submit her 2013 tax return, Plaintiff cannot recover partial disability benefits for 2013 forward. See Gaddy, (summary judgment granted on claim for residual disability benefits on multiple grounds including where plaintiff failed to produce financial information showing requisite loss of income); Schwartz v. New York Life Ins. Co., 2003 U.S. Dist. LEXIS 14371 (S.D. Iowa 2003) (finding that Plaintiff was not entitled to residual disability benefits for 2001 and 2002 because plaintiff failed to submit tax returns for those years).

Finally, Plaintiff's argument mischaracterizes the contents of the "File Consultation". The "File Consultation" does not say Plaintiff suffered a 75% Loss of Income of as of July 23, 2013. The "File Consultation", which took place on July 23, 2013, found that based on the financial information submitted, Plaintiff suffered a greater than 75% Loss of Income for the period March

10, 2012 through June 9, 2012. (Exhibit G). The File Consultation states in relevant part:

> - According to the information received through June 2012, the Insured continued to bill for pain management procedures but appears to experience a greater than 75% LOI. Again, the financial information submitted to date is not in the proper format or of substance to perform accurate calculations. However, we will issue Partial Disability benefits for the period of March 10, 2012 through June 9, 2012 at 100% in order to be of service to the Insured. (Emphasis added).

(Plaintiff's Memorandum In Support, p. 18, Ex. 16).

As can been seen from the above, MassMutual only agreed that Plaintiff suffered a Loss of Income up to June 9, 2012. Accordingly, MassMutual paid Plaintiff 100% of the Partial Disability benefit for that period. MassMutual did not agree that Plaintiff suffered a greater than 75% Loss of Income after June 9, 2012 because "the financial information submitted to date is not in the proper format or of substance to perform accurate calculations." (Exhibit G). As evidenced by page 2 of the File Consultation, MassMutual indicated that it needed additional information in order to process the claim after June 9, 2012. The July 23, 2013 File Consultation was in no way a concession by MassMutual that Plaintiff suffered a greater than 75% Loss of Income from June 2012 to present. (Exhibit G). Accordingly, Plaintiff's Motion For Partial Summary Judgment as to entitlement to 100% Partial Disability Benefits after June 9, 2012 should be denied.

H. Plaintiff Is Not Entitled To Attorney's Fees Pursuant To S.C. Code Ann. § 38-59-40 In That Plaintiff Failed To Establish MassMutual Denied Portions of Plaintiff's Claim Without Reasonable Cause or In Bad Faith.

Plaintiff failed to establish that MassMutual denied portions of Plaintiff's claim without reasonable cause or in bad faith, therefore an award of attorney's fees is not appropriate. S.C. Code § 38-59-40 provides for an attorney's fees award where an insurer refuses to pay a claim without reasonable cause or in bad faith. Mixson, Inc. v. Am. Loyalty Ins. Co., 349 S.C. 394, 562 S.E.2d 659, 663 (S.C. App. 2002); see also Boggs v. Aetna Cas. & Sur. Co., 272 S.C. 460, 252 S.E.2d

565, 568 (S.C. 1979) (applying a predecessor of the current statute). The statute "did not intend . . . that attorneys' fees should be paid in every contested case won by the insured." Boggs, 252 S.E.2d at 568.

As was previously discussed, MassMutual's claim determinations that are the subject of Plaintiff's motion (i.e. Plaintiff was not Totally Disabled, Plaintiff was not entitled to 100% Partial Disability benefits from June 2010 to July 2011 and Plaintiff was not entitled Partial Disability benefits from July 2012 to present) were supported by the terms of the MassMutual policy and the evidence developed during the claim investigation and comported with disability insurance standards. (See Exhibits D; G and H, pp. 35-42, 49-50). Therefore, MassMutual's claim determinations were supported by reasonable cause and were not made in bad faith. "If there is a reasonable ground for contesting a claim, there is no bad faith." Crossley v. State Farm Mutual Insurance Co., 307 S.C. 354, 415 S.E.2d 393 (S.C. 1992). Where an insurance company is justified in litigating an issue, it is not acting in bad faith. Shumpert v. Time Insurance Company, 329 S.C. 605, 496 S.E.2d 653 (Ct. App. 1998).

Where the insurer's actions are based on a reasonable interpretation of its policy, an insurer cannot be said to have acted without reasonable cause or in bad faith in denying the claim. Palmetto Ford v. First Southern Insurance Company, 1993 U.S. App. LEXIS 24481 (4th Cir.1993) (Unreported) ("First Southern's actions were based on a reasonable interpretation of the terms of the policy. . . . First Southern based its refusal to defend on an exclusion in the policy which was valid at the time. No bad faith can be demonstrated or imputed from First Southern's course of conduct."); Helena Chemical Company v. Allianz Underwriters Insurance Company; 357 S.C. 631, 594 S.E.2d 455 (S.C. 2004) (holding that an insurer had a reasonable ground for contesting a claim for environmental cleanup costs, based on a Fourth Circuit case that predicted under South

Carolina law cleanup cost would not be treated as "damages." The S.C. Supreme Court went on to hold, "Therefore, the insurers did not improperly contest coverage, and the trial court correctly granted summary judgment on the bad faith claims."); Poston v. National Fidelity Life Insurance Company, 303 S.C. 182, 399 S.E.2d 770 (S.C. 1990) (reversing an award of punitive damages involving a life insurance case holding "[h]ere, the receipt is ambiguous and susceptible of more than one construction. Insurer's interpretation that the receipt limits its liability to $100,000 does not rise to the level of bad faith). Because MassMutual had a reasonable basis for its interpretation of the definition of Total Disability, including but not limited to authority from both Fourth Circuit and District of South Carolina, Plaintiff is not entitled to an award of attorney's fees.

Likewise, MassMutual's claim determination that Plaintiff was not entitled to 100% Partial Disability benefits from June 2010 to July 2011 was supported by the terms of the policy and the evidence developed during the claim. As was previously argued, because Plaintiff failed to submit proof that she suffered a Loss of Income greater than 75% for the period of September, 2010 through July 2011, MassMutual's payment of 50% of the Partial Disability amount was appropriate. See Gaddy; Massachusetts Mut. Life Ins. Co. v. Bussell, 2008 U.S. Dist. LEXIS 110455 (C.D. Cal. 2008) ("The disabled insured/claimant bears the burden of proving a right to policy benefits under a disability policy"); Napoli v. First Unum Life Ins. Co., 2005 U.S. Dist. LEXIS 7310 (S.D.N.Y. 2005) ("Plaintiff bears the burden of proving entitlement to a disability benefit."). Despite Plaintiff's failure to submit sufficient proof of a Loss of Income, MassMutual, as a service to Plaintiff, paid the 50% Partial Disability benefits to Plaintiff for the period September, 2010 through July 2011. Accordingly, Plaintiff's payment of 50% of the Partial Disability benefits made as a service to Plaintiff cannot be said to be without reasonable cause or in bad faith.

Finally, MassMutual's denial of benefits after June 9, 2012, was reasonable and not in bad faith. Again, Plaintiff failed to submit sufficient evidence showing entitlement to any Partial Disability benefits after June 2012 in that: (1) Plaintiff failed to prove a Demonstrated Relationship between any alleged Loss of Income and the current Disability and/or (2) Plaintiff failed to submit sufficient evidence to calculate any alleged Loss of income after June 9, 2012. Accordingly, MassMutual's decision to not pay Partial Disability benefits at 100% after June 9, 2012 was reasonable and not in bad faith.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment should be denied, and Defendant's Motion For Summary Judgment Should be granted.

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